No. 145.

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for Appellee.

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In the Supreme Court of the United States.

JOHN N. QUACKENBUSH, APPELLANT,
v.
THE UNITED STATES.
} No. 145.

BRIEF FOR THE UNITED STATES.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN N. QUACKENBUSH, APPELLANT,
v.
THE UNITED STATES. } No. 145.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appellant in this case seeks payment of a certain amount of salary which he claims was due him as an officer of the United States Navy during a period when he was out of the service. He avers that he was illegally dropped from the rolls of the Navy and that the language of the act of Congress by which he was restored to the service in 1897 by implication charges injustice in his dismissal and allows compensation from the date when his name was dropped.

The appellant was tried by court-martial on certain charges preferred by the Secretary of the Navy under date of February 6, 1874, was found guilty of the charges of "drunkenness" and "scandalous conduct tending to the destruction of good morals," and sentenced to be dismissed from the naval service of the United States, the said sentence being approved in due form by the President of the United States, June 5, 1874, and under date of June 9, 1874, the appellant was notified of said dismissal by a letter mailed to his address in Boston, Mass., notice of the action being also sent the same day to the Auditor of the Treasury. The following day (June 10, 1874) the President sent to the Senate for confirmation the nomination of Lieut. Commander Winfield S. Schley "to be commander in the Navy from the 10th of June, 1874, vice Commander John N. Quackenbush, dismissed," and said nomination was confirmed June 12, 1874, and a commission issued to Schley the same day.

On the 12th of June, 1874, the same day that Schley was confirmed by the Senate, the Secretary of the Navy addressed a letter to the appellant at his Boston address, asking that the letter of dismissal mailed him June 9, 1874, be returned. This second letter from the Secretary was received by the appellant simultaneously with the letter of dismissal. The letter of dismissal was returned as requested.

According to the record, nothing more appears to have been done in the matter by anyone for nearly six months, when the appellant was notified by the Secretary of the Navy that the sentence of dismissal had on the 9th day of June, 1874, been mitigated to suspension from rank

and duty, on furlough pay, for six years, the suspension to date from said 9th of June, whereupon the name of John N. Quackenbush, the appellant, was thereafter borne upon the rolls as an officer under suspension for the period indicated, and after the expiration of the period of suspension as on "waiting orders." In 1881 a question arose as to the status of the appellant, and finally, by order of the Secretary of the Navy, his name was left off the register of the Navy Department published August 3, 1883, the action of the Secretary being based upon the decision of this court in the *Blake Case* (103 U. S., 227). The appellant, however, was not allowed pay after March 31, 1881, when his status as an officer in the Navy was first questioned.

The records of the Navy Department show that the number of commanders borne upon the active list of the Navy was at the maximum number allowed by law from the date of the appointment of W. S. Schley, and when the appellant's name was dropped from the roll in 1883 the President sent to the Senate the nomination of D. W. Mullan to be a commander in the Navy, "vice John N. Quackenbush, no longer in the service."

In February, 1897, Congress passed the following act for the relief of the appellant:

[Private—No. 169.]

AN ACT for the relief of John N. Quackenbush, late a Commander in the United States Navy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of law regulating the

appointments in the Navy by promotion in the line, and limiting the number of commanders to be appointed in the United States naval service, are hereby suspended for the purpose of this act only, and only so far as they affect John N. Quackenbush; and the President of the United States is hereby authorized, in the exercise of his discretion and judgment, to nominate and, by and with the advice and consent of the Senate, to appoint the said John N. Quackenbush, late a commander in the Navy of the United States, to the same grade and rank of commander in the United States Navy as of the date of August 1, 1883, and to place him on the retired list of the Navy as of the date of June 1, 1895: *Provided*, That he shall receive no pay or emoluments except from the date of such reappointment.

Received by the President February 4, 1897.

[Note by the Department of State: The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

In pursuance of this act Commander Quackenbush was appointed, and May 26, 1897, took the oath of office. This act, the appellant contends, allowed him pay from August 1, 1883, as being the date of his reappointment, though the pay officers of the Government compensated him only from said May 26, 1897.

Suit was brought in the Court of Claims in behalf of the appellant to recover pay for the period stated, but after a full hearing of the case his petition was dismissed, whereupon an appeal was taken for him to this court.

BRIEF OF ARGUMENT.

The first contention of the appellant is that he was illegally removed from his office as a commander in the Navy when the Secretary, in 1883, ordered his name dropped from the Naval Register. The appellees, on the other hand, assert that the appellant was legally removed from his office June 9, 1874, and the attempted revocation of the order of dismissal was null and void, and that he was not rightfully an officer in the Navy during the time he was recognized as such from said date of June 9, 1874, until August 1, 1883.

In the various cases relating to this issue as passed upon by this court, it has been decided that in time of peace if an officer of the Navy be legally tried by court-martial, sentenced to dismissal, which sentence is approved by the President, and the accused be notified of said action, he is no longer in the service; and an attempt to revoke the sentence thereafter is of no effect. Furthermore, the court has said that if a successor to the said officer be nominated and the nomination be confirmed by the Senate, such nomination and confirmation is complete evidence of the removal from office.

Ex parte Hennen, 13 Peters, 261.
Mimmack v. *United States*, 97 U. S., 426.
McElrath v. *United States*, 102 U. S., 426.
Blake v. *United States*, 103 U. S., 227.
Runkle v. *United States*, 122 U. S., 558.
Parsons v. *United States*, 167 U. S., 324.
Montgomery's Case, 5 C. Cls. R., 93.
Satterlee Clark's Case, 2 Op. Atty. Gen., 67.
Whitney's Case, 4 Op. Atty. Gen., 274.
Kendall's Case, 4 Op. Atty. Gen., 306.
Downing's Case, 7 Op. Atty. Gen., 99.

There is no contention on the part of the appellant that any irregularity existed in the court-martial proceedings or that the finding was not fully warranted by the evidence; there is no claim that the requisite formalities were not observed in the approval and ratification of the findings by the President or the Secretary of the Navy; but it is insisted that the act of the Secretary of the Navy in recalling the notice of dismissal, three days after the same had been forwarded, and two days after appellant's successor had been nominated to the Senate, the same day said successor was confirmed, and the quota of officers of the grade in question had been filled, was sufficient to revoke the dismissal. In view of the several decisions of this court on the question such action was of no effect to reinstate the deposed officer. He could only be restored to his old position in the way and manner provided by the Constitution and laws of the United States; that is to say, by a formal nomination sent to the Senate, and, with its approval, a reappointment and commission anew.

WHAT THE RECORDS SHOW.

The fact must not be overlooked that in contradiction of the letter of the Secretary of the Navy of December 8, 1874, notifying the appellant that his sentence had been mitigated to date from June 9, 1874, the records show that on the 10th of said month of June there was sent to the Senate for confirmation the nomination of Lieut. Commander Winfield S. Schley "to be a commander in the Navy from the 10th of June, 1874, vice Commander John N. Quackenbush, dismissed." Here

is an official announcement supplementing those which preceded it, that the appellant was, on tho 10th day of June, 1874, regarded by the President and the Secretary of the Navy as no longer in the naval service. The so-called mitigation, as outlined in the letter of December 8, must have been the carrying out of an afterthought, and was clearly illegal. There was no injustice done the appellant. If injustice were done to any party it was to the appellees when the name of the appellant was illegally carried upon the rolls of the Navy, and he for a number of years received pay for which he rendered no service and to which he was not legally entitled.

THE PRESIDENT'S ACTION JUDICIAL IN CHARACTER.

An examination of the articles governing the Navy still further shows that the mere notification signed by the Secretary was inadequate to reinstate the appellant or to mitigate the sentence of dismissal which has been approved by the President. Article 53 (R. S., sec. 1624) provides that "no sentence of a court-martial, extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President." This language is similar to that of article 65 of the Articles of War in the act of April 10, 1806, 2 Stat., 359, 367, respecting which this court has held (*Runkle* v. *United States*, 122 U. S., 543) that the action thus required of the President is judicial in its character and not administrative. If this be true, is not the action of the President in mitigating a sentence he has already approved likewise judicial

in its character, and should not his decision in setting aside his former approval be manifested in an affirmative manner, the same as in the first instance; that is, by his own signature, and that, too, at the time of the alleged mitigation? There is no record to show any mitigation except the letter of the Secretary of the Navy dated December 8, 1874, more than six months later.

THE NOTICE OF DISMISSAL.

Counsel for the appellant contends in his brief that the notice of dismissal should have been a personal one. Just what is meant by this contention does not appear. The appellant admits that he received through the mails a notice of dismissal addressed to him personally and that in response to a letter from the Secretary of the Navy he returned the said notice. If the contention be that the notice should have been delivered by an officer of the Navy Department specially assigned to the duty rather than the agent of the Government through whom it was delivered, who happened in this case to have been a letter carrier, then any officer who may be convicted by a court-martial and sentenced to dismissal would have it in his power to nullify the sentence by keeping out of the way and thus preventing service upon him. He could continue his compensation under the rule whereby his pay is not stopped until he receives a legal notice of dismissal.

NO HASTE MANIFESTED IN THE PROCEEDINGS.

It can not be said that the various steps by which the appellant was removed from the service were taken with

any degree of haste and that a mistake probably occurred. On the contrary, there is every evidence that the proceedings were deliberate and carefully followed. He was tried by court-martial in February, 1874, the sentence of dismissal was approved by the President June 5 following, or nearly four months later. On the 9th of June an official notice of the dismissal was forwarded by the Secretary of the Navy to the appellant's address in Boston; on the 10th of the same month the nomination of his successor was sent to the Senate, and on the 12th of June the said nomination was confirmed by the Senate. All of these steps, with the possible exception of the last, were taken before there is any manifestation, so far as the record discloses, of a desire on the part of anybody to mitigate the sentence, and as the confirmation by the Senate of Schley's nomination occurred the same day the letter recalling the notice of dismissal was signed by the Secretary of the Navy, it is difficult to say which of these two events occurred first. Enough occurred previously, however, to make plain the intention of the President that the appellant be dismissed from the service. It should be remembered also that the offense of which the accused was found guilty—"scandalous conduct tending to the destruction of good morals"—was unusual and very naturally excited interest in the court-martial proceedings. It is not likely that the various steps were taken without due deliberation and care.

WHAT CONGRESS INTENDED.

The second contention of the appellant is that by the terms of the act to reappoint him, because of the alleged

injustice done him, he is awarded pay from the 1st of August, 1883, notwithstanding the proviso "that he shall receive no pay or emoluments except from the date of such reappointment," which was intended, if it had any purpose at all, to eliminate any possible retroactive effect respecting compensation the statute might have in its construction or interpretation. The counsel for the appellant argues that the proviso was intended to cut off any pay prior to August 1, 1883, one of the dates borne on the commission. To fully understand this claim it should be borne in mind that the appellant received no pay from March 31, 1881, until May 26, 1897. But the appellant could not have received pay prior to August 1, 1883, without some proviso or language equivalent thereto in the act authorizing his reappointment. To what period of time then does the proviso apply? It was clearly intended to negative any implication that might arise from the date mentioned in the body of the act. As the Court of Claims in its opinion said, "it is clear that without the proviso the claimant could not * * * recover salary prior to August 1, 1883. So that the proviso must be given some effect different from that which would exist without it."

If, therefore, the omission of the proviso would not have had the effect of allowing pay or emoluments prior to August 1, 1883, its use in the act must apply to a later period.

THE APPOINTMENT AND THE COMMISSION.

The proviso is that no pay shall be allowed except from "the date of such reappointment." It becomes

necessary to consider the language etymologically. The question is what was meant by the "date" of the "reappointment." The word "reappointment," it is safe to say, means, according to any dictionary of the English language, a renewed appointment, and the word "date" as used in the act means the time the renewed appointment was made. What acts are necessary to constitute an appointment? In the leading case on this point (*Marbury* v. *Madison*, 1 Cr., 137), Chief Justice Marshall, after reciting the second and third sections of Article II of the Constitution and the laws enacted by Congress governing appointments, said their language "seem to contemplate three distinct operations:

> First. The nomination. This is the sole act of the President, and is completely voluntary.
>
> Second. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.
>
> Third. The commission. To grant a commission to a person appointed might perhaps be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States."
>
> The acts of appointing to office and commissioning the persons appointed can scarcely be considered as one and the same, since the power to perform them is given in two separate and distinct sections of the Constitution. The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision in the second section of the second article of the Constitution which authorizes Congress "to vest, by law, the appointment of such inferior officers as they

> think proper in the President alone, in the courts of law, or in the heads of departments," thus contemplating cases where the law may direct the President to commission an officer appointed by the courts or heads of departments. In such a case to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

The commission is in fact only prima facie evidence of a right to exercise office after an appointment. (*Hill* v. *The State of Alabama*, 1 Ala., 559; *State* v. *Chapin*, 110 Ind., 272; *State* v. *Allen*, 21 Ind., 516; *State* v. *Peele*, 124 Ind., 515; *Gulick* v. *New*, 14 Ind., 93; *Beal* v. *Ray*, 17 Ind., 554; *State* v. *Jones*, 19 Ind., 356.)

The commission is a matter of form which may or may not be necessary, according as usage and positive statute may or may not render it indispensable. (*Johnston* v. *Wilson*, 2 N. H., 202; *Newcum* v. *Kirtley*, 13 B. Mon. [Ky.], 515.)

It forms no part of the appointment. (*People* v. *Murray*, 5 Hun. [N. Y.], 42; *Billy* v. *State*, 2 Nott & M. [S. C.], 357.)

The presumption that a deed was executed and delivered on the day of its date is not conclusive, and the true date of execution and delivery may be proved *aliunde*. (*Pascault* v. *Cochran*, 34 Fed. Rep., 358.)

If after the President had reappointed Commander Quackenbush the commission had been issued in the name of another person is it likely that the one named in the commission would have been given any right, legal or equitable, to the office? The authorities are all against any such contention. (*Gulick* v. *New*, 14 Ind.,

93; *State* v. *Johnson*, 17 Ark., 407; *State* v. *Chapman*, 44 Conn., 595; *State* v. *Capers*, 37 La. Ann., 747; *Putnam* v. *Langley*, 133 Mass., 204; *Collins* v. *State*, 8 Ind., 344.)

If Congress had intended that the appellant should have back pay from August 1, 1883, why stop at that date? Why not go back to March 31, 1881? If he was entitled to compensation for any period of time prior to May 26, 1897, why cut him off from sixteen months when he was recognized as an officer of the Navy, though "on waiting orders," and then pay him for a period when he was neither recognized as being connected with the Navy nor liable to be called upon for the performance of any duty in said service.

The object of antedating the commission was undoubtedly to give the appellant rank superior to those officers of the same grade whose commissions were dated subsequent thereto, as well as the benefit of section 1588 of the Revised States, whereby the pay of an officer on the retired list is regulated according to the length of his service upon the active list. While Congress could not see its way clear to grant the appellant pay for the long period when he performed no duty, it was willing to allow him to outrank certain other officers of his grade who had been appointed after he was dropped from the rolls and to allow him the benefit thereafter of longevity pay.

HISTORY OF THE LEGISLATION.

Without touching upon the efforts for relief in former Congresses it may be well to consider the acts of the Congress (the Fifty-fourth) which passed the bill by

which the appellant was restored to the Navy. In the House of Representatives the bill (H. R. 6739) was introduced with a long preamble giving a brief history of the case, and beginning with the enacting clause, read as follows:

> *Be it enacted, etc.*, That the provisions of law regulating appointments in the Navy by promotion in the line, and limiting the number of commanders to be appointed in the United States naval service, are hereby suspended for the purpose of this act only, and only so far as they affect John N. Quackenbush; and the President of the United States is hereby authorized, in the exercise of his discretion and judgment, to nominate and, by and with the advice and consent of the Senate, to appoint said John N. Quackenbush, late a commander in the Navy of the United States, to the same grade and rank of commander in the United States Navy as of the date of August 1, 1883, and to place him on the retired list of the Navy as of the date of June 1, 1895, the same as if he had never been considered out of the service since his original entrance therein.

On April 28, 1896, the matter (H. R. 6739) came up in the House of Representatives (Congressional Record, vol. 28, part 5, p. 4529). The Committee on the Judiciary reported an amendment at the end of the bill to strike out the words "the same as if he had never been considered out of the service since his original entrance therein" and insert the following:

> *Provided*, That he shall receive no pay or emoluments except from the date of such reappointment.

Amendments to the bill and to the reported amendment were offered. In the bill it was proposed to strike out the date of retirement, "June 1, 1895," and insert the words "approval of this act," and in lieu of the word "reappointment" in the proposed proviso to insert the word "retirement." These amendments were adopted, and as thus amended, after debate, the bill was passed. The latter part of the bill was thus changed so as to read:

> To appoint said John N. Quackenbush, late a commander in the Navy of the United States, to the same grade and rank of commander in the United States Navy as of the date of August 1, 1883, and to place him on the retired list of the Navy as of the date of approval of this act: *Provided*, That he shall receive no pay or emoluments except from the date of such retirement.

The bill came up in the Senate May 28, 1896 (Congressional Record, vol. 28, part 6, pp. 5856–5858) and the proviso was amended so as to read:

> *Provided*, That he shall receive no pay or emoluments, except from the date of his confirmation by the Senate.

As thus amended the bill was passed by the Senate.

The amendment was concurred in by the House of Representatives June 4, 1896, without debate. (Congressional Record, vol. 28, part 7, p. 6112.)

The bill was duly signed by the Speaker of the House of Representatives and by the Vice-President, and was sent to the President, but he failed to give it his approval and Congress adjourned before the ten-day limit had expired.

In the next session of the same Congress (the Fifty-fourth) bills were introduced in both Houses for the

relief of the appellant. The one introduced in the Senate (S. 3313) first got under way, and on the 7th of January, 1897, the bill was passed by that branch of Congress in the form in which it became a law (Congressional Record, vol. 29, part 1, p. 535), there being no debate.

It passed the House of Representatives February 1, 1897, without debate touching the language of the bill (Congressional Record, vol. 29, part 2, p. 1400), an became a law without the approval of the President.

"GRADES" IN THE NAVY.

Let us examine the language of the act more particularly. It authorizes the President, in the exercise of his discretion and judgment, to appoint the appellant "to the same grade and rank of commander in the United States Navy as of the date of August 1, 1883, and to place him on the retired list of the Navy as of the date of June 1, 1895."

In the Navy there are grades for duty, for honor, and for pay, some by name and others by description. An officer has a grade *of* his class and also a grade *in* his class upon which his pay is fixed, depending upon length of service. The word "grade" in section 1588, Revised Statutes, refers to the divisions of officers into five-year periods of service. An officer retired in the third period of five years' service is entitled to 75 per cent of the sea pay of that pay grade, while one retired in the first five years' period receives but 50 per cent of the sea pay of that pay grade. (*Thornley's Case*, 18 C. Cls. R., 111; *Rutherford's Case*, 18 C. Cls. R., 339; *McClure's Case*, 18 C. Cls. R., 347; *Brown's Case*, 18 C. Cls. R., 537).

Calculating the five-year periods in the case of the appellant from the date of the commission, August 1, 1883, it will be noted that the day of his retirement, June 1, 1895, would fall within the third period of five years, and he would receive 75 per cent of the sea pay of a commander, the highest rate allowed him by law, instead of 50 per cent, the rate allowed him, had he been placed upon the retired list with the date of his commission the same as that of his reappointment, viz, May 26, 1897. The findings show that he is now paid at the rate of 75 per cent of the sea pay of a commander. Here, then, is found the explanation of the dates given in the commission.

The appellant cites in support of his argument the case of *Kilburn* v. *United States* (15 C. Cls. R., 46 and 47), "as being peculiarly applicable to the facts in this case." Had he quoted a little more from the same opinion he would see that it still further applied to this case, viz:

> The counsel for the claimant has argued with ingenuity that there are two classes of private acts of this nature; that in one class pay, when a party was out of the service, is prohibited in express terms, while in the other class no such prohibition is expressed, and from the silence of the statute the right to pay is to be implied. We do not find that it has been usual to express such a prohibition, except in those cases where officers are authorized to be restored as of a previous specified date. This might entitle them to pay from such time if the contrary were not expressly declared.
>
> Much stress is laid by the claimant on the circumstance that under his commission he appears to

have been appointed an ensign from the 13th day of July, 1871. But the right of the claimant springs from the language of the statute and not of the commission. The commission is to be interpreted by the law that authorized the appointment. It is merely evidence of the appointment. If the commission transcends the limits of the appointment by substituting an erroneous date for that fixed by the statute, the commission becomes to that extent inoperative and void. The error can not prevail, but must give way to the true date. The acts of appointing to office and commissioning the person appointed are two separate and distinct acts, arising out of two separate and distinct sections of the Constitution. (*Marbury* v. *Madison*, 1 Cranch, 157.) The argument of the claimant confounds these two independent and distinct acts, and, in our judgment, ought not to prevail.

Service in a grade becomes the test of pay under the general law, and in view of the principles enunciated in opinions cited herein as applicable to the language of the proviso in the act authorizing the restoration of the appellant to the Navy, it is respectfully submitted that Congress never intended, in addition to his restoration and the bestowal of the highest pay of his rank allowed an officer on the retired list, to present him with $32,459.46, as requested in his petition printed in the record of this case.

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